

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>TAFT PARTNERS DEVELOPMENT GROUP</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 817465</b>
for Revision of a Determination or for Refund of Tax on	:	
Gains Derived from Real Property Transfers under	:	
Article 31-B of the Tax Law.	:	

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Petitioner, Taft Partners Development Group, c/o Jacques Catafago, Catafago & Lonergan, 350 5<sup>th</sup> Avenue, Suite 4810, New York, New York 10118, filed a petition for revision of a determination or for refund of tax on gains derived from real property transfers under Article 31-B of the Tax Law.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 17, 2001 at 9:15 A.M., with all briefs to be submitted by May 11, 2001. Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler, LLP (Louis Tuchman and Daniel Besser, Esqs., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

On November 8, 2001, the Administrative Law Judge issued a determination holding that petitioner did not timely raise the issue of whether it was the transferee in the partnership interest transfer. In view of this conclusion, the Administrative Law Judge did not address this issue in his determination.

Petitioner filed an exception to the determination of the Administrative Law Judge. On January 23, 2003, the Tax Appeals Tribunal issued a decision reversing the Administrative Law

Judge and holding that petitioner had timely raised the issue of whether it was the transferee in the partnership interest transfer. The Tribunal remanded the matter to the Administrative Law Judge for a determination on the issue noted above. Petitioner appeared on remand by Gary J. Gleba, Esq.

### ***ISSUE***

Whether petitioner is the transferee in the partnership transfer.

### ***FINDINGS OF FACT***

1. The Division of Taxation ("Division") issued a Notice of Determination, dated April 30, 1992, to Sholom Drizin asserting real property transfer gains tax due of \$643,309.00, plus interest of \$804,228.86 and penalties of \$225,158.00, for a total amount due of \$1,672,695.86.

The "Computation Section" of the notice contained the following explanation:

Section 1447.3 of Article 31B of the tax law states in part “. . . in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire. . . the transferee shall be personally liable for the taxes stated to be due in a Notice of Determination . . . and such liability may be assessed and enforced in the same manner as the liability for the tax under this Article. . . .”

The notice went on to state that a search of the Division's files failed to find a filing on the transfer of a controlling interest of Taft Partners Development Group from Mr. Drizin to petitioner and that as such filing was required, the tax had been computed as shown.<sup>1</sup>

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<sup>1</sup>Official notice is being taken of the record of another matter before the Division of Tax Appeals pursuant to State Administrative Procedure Act § 306(4) which provides that "official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, the records of cases involving one or more of the same parties or the records of cases involving totally different parties (*Berger v. Dynamic Imports, Inc.*, 51 Misc 2d 988, 274 NYS2d 537; *Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990; 57 NY Jur 2d, Evidence and Witnesses, § 47). The record of the proceeding before the Division of Tax Appeals of which official notice is being taken is *Matter of Sholom Drizin*. Copies of the relevant documents are being forwarded to the parties. The taking of official notice applies to Findings of Fact "1", "2", "4", "7" and "8." These Findings of Fact were deleted by the Tax Appeals Tribunal in their decision relating to this matter "as such statements are not facts corroborated by the record of this proceeding."

2. On January 5, 1984, Royale Towers Associates ("seller") and Sholom Drizin ("purchaser") entered into an Amended and Restated Agreement For Sale and Purchase of the Taft Hotel. According to this purchase and sale agreement, the purchase price was to be \$32,505,280.00. The terms also provided that contemporaneously with the execution and delivery of the contract the purchaser was to deposit \$3,200,000.00 with the seller. The property known as the Taft Hotel is located at 761-779 Seventh Avenue, New York, New York.

3. On March 1, 1984, Sholom Drizin entered into an Agreement of Assignment, as assignor, with Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher collectively listed as the assignee, "having a place of business c/o Goodstein Management, Inc. . . ." whereby Sholom Drizin, owner of a 100% interest, agreed to assign to the assignees a 50% interest in an agreement for sale and purchase of premises located at 761-779 Seventh Avenue, New York, New York (Taft Hotel), dated January 5, 1984, which he had with Royale Towers Associates. In addition, Sholom Drizin and the assignees were to enter into a limited partnership agreement and the partnership was to acquire title to the premises.

4. On March 7, 1984, Drizin and the assignees entered into an Agreement of Limited Partnership of Taft Partners Development Group ("Taft Partners").

Pursuant to the agreement: (a) Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were, collectively, the managing general partners; (b) Mr. Drizin, Arthur Cohen, Steven Goodstein, Martin Goodstein and Jacob Sopher were general partners; and (c) Andrew Goodstein, Martin Goodstein, Patricia Kay Goodstein and Mitchell Siegel, as trustees for the benefit of ("f/b/o") Michele A. Goodstein under trust agreement ("u/t/a") dated July 7, 1967, f/b/o Geoffrey A. Goodstein u/t/a dated July 7, 1967, and f/b/o Shari L. Goodstein u/t/a dated July 7, 1967, and Samuel Lewis were limited partners. Trustees Martin Goodstein, Patricia Kay

Goodstein and Mitchell Siegel were listed in the agreement "with an address c/o Goodstein Management, Inc., 211 East 46th Street, New York, New York."

The general partners held the following percentage interests in the partnership: Sholom Drizin - 50%; Arthur Cohen - 20%; Steven Goodstein - 8.5%; Martin Goodstein - 2%; and Jacob Sopher - 10%. The remaining 9.5% interest was held by the limited partners.

5. On March 7, 1984, Sholom Drizin ("seller") and Steven Goodstein ("purchaser") entered into a Partnership Interest Acquisition Agreement ("acquisition agreement") whereby Mr. Drizin agreed to sell to Steven Goodstein<sup>2</sup> an additional 35% interest in a partnership known as "Taft Partners Development Group" for \$8,320,000.00. Drizin retained a 15% interest in the partnership and became a limited partner. This sale was consummated on September 24, 1984.

6. According to the terms of the acquisition agreement, Mr. Drizin, simultaneously with the receipt of a \$1,600,000.00 down payment and a Letter of Credit in the amount of \$6,720,000.00, was to execute and deliver to Steven Goodstein an instrument "for the purpose of assigning the Interest to Purchaser or his assignee(s) or designee(s)." In addition, Mr. Drizin was to execute any documents or certificates required "in connection with the transfer of the Interest and the conversion of Seller's remaining interest in the Partnership to a limited partner's interest." Pursuant to paragraph 6, the agreement was:

conditioned upon Purchaser obtaining and delivering to Seller the Letter of Credit, prior to or simultaneously with the downpayment on a date not later than the date the Partnership acquires title to the Premises.

This paragraph also provided that, in the event that the Letter of Credit was not obtained and delivered to the seller or if he did not comply with the requirements contained in paragraph 5, the

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<sup>2</sup> Mr. Goodstein acted in concert with an investor group of three other individuals in acquiring such interest. The three other individuals were Arthur Cohen, Martin Goodstein and Jacob Sopher, the remaining partners of petitioner.

transaction would be null and void and "neither party shall have any claim against the other."

Paragraph 7 of the acquisition agreement contained the "Conditions Precedent" to the consummation of the sale of the interest, which included, *inter alia*, that the March 1, 1984 assignment between petitioner, Steven Goodstein, Martin Goodstein, Arthur Cohen and Jacob Sopher "shall not have been rescinded."

The agreement also specifically provided that Mr. Drizin was responsible for making the requisite real property transfer gains tax (hereinafter "gains tax") filings and paying the tax which "*may*" be due, regardless of whether the State made a claim for said taxes at closing or at any future time.

7. Following the Division's audit of the transfers to the condominium purchasers and the discovery that the transfer at issue had not been reported, Mr. Drizin executed as a partner of petitioner a Real Property Transfer Gains Tax Questionnaire -Transferee, Form TP-581 ("transferee questionnaire"). According to the questionnaire, petitioner was the transferee which was acquiring a 100% fee interest in 761-779 Seventh Avenue, New York, New York, Section 4, Block 1003, Lot 1 on May 15, 1984 for \$32,280,000.00 from transferor, Royale Tower Associates.

8. On June 11, 1984, Chase Manhattan Bank ("Chase") sent a loan commitment letter for the purchase and renovation of the fee premises located at 777 Seventh Avenue, New York, New York to the Goodstein Construction Company. The loan commitment letter was addressed to "The Goodstein Construction Company, 211 East 46th Street, New York, New York, Attention: Mr. Martin Goodstein."

Included as part of the terms in Chase's loan commitment letter were the following:

We agree to lend \$102,000,000 to a partnership comprised of Martin and Steven Goodstein, Arthur Cohen and Henry Sopher (hereinafter and in the General Conditions attached hereto termed the 'Borrower') of which up to \$41,000,000 shall be advanced for acquisition of the Premises (the 'Acquisition Allocation'), with the balance (the 'Construction Allocation') to be advanced for the renovation of the existing building located on the Premises into a multi-use condominium building containing 20,470 square feet of professional space, 23,493 square feet of retail space, 24,470 square feet below grade, including a 4,996 square foot health club and residential space containing 720 condominium apartments aggregating 343,207 saleable square feet of space, all of which shall be completed within 24 months from the date of the loan closing.

Additionally, Chase required that a guaranty of payment of the note be executed by Martin and Steven Goodstein, Arthur G. Cohen and Henry Sopher.

9. Taft Partners acquired a 100% fee interest and developed the property identified as the Taft Hotel and converted it to condominium status. In connection with this development, petitioner filed transferor questionnaires, reporting its gain in connection with the disposition of condominium units in accordance with the regulations established by the Division requiring periodic updates of estimates of consideration and of costs. In these tax returns, petitioner sought to claim the cost of the acquisition of the 35% partnership interest transferred by Sholom Drizin to Steven Goodstein as part of its original purchase price. During the audit of these returns, the Division discovered that the transfer of this 35% interest had never been reported for gains tax purposes and issued a notice of determination to Mr. Drizin for the gains tax on such transfer.

10. Sholom Drizin petitioned the notice of determination and was found liable for gains tax in the amount of \$623,541.00, plus penalty and interest by decision of the Tax Appeals Tribunal dated May 15, 1997.

Mr. Drizin then commenced an Article 78 proceeding in the Appellate Division, Third Department. As Mr. Drizin had failed to pay the amount due or file a bond, Assistant Attorney General Julie Mereson made a motion to dismiss the proceeding which was granted.

11. Following the dismissal of the Article 78 proceeding, settlement discussions began between Ms. Mereson and representatives of Mr. Drizin: Jeremy Heisler, David Eisig, Judge Fusco and David Jaroslawicz. The only matter discussed during these negotiations was the assessment issued to Mr. Drizin, assessment number L-005583137. During the negotiations, Ms. Mereson referred to a computation of tax, penalty and interest due which indicated a balance due of \$980,010.00, including the application of the refund which is at issue in this matter. The representatives of Mr. Drizin drafted a stipulation of settlement which Ms. Mereson reviewed, made some changes to and then executed along with David Jaroslawicz. The stipulation provides as follows:

RE: MATTER OF SHOLOM DRIZIN DTA NO. 811808

IT IS HEREBY STIPULATED BY AND AGREED, by and between the taxpayer, Sholom Drizin, and the State of New York Department of Taxation and Finance, that the above matter and claim of the Department of Taxation and Finance for taxes, penalties and interest under assessment number L-005582137 is settled against Sholom Drizin for the amount of Eight Hundred Fifty Thousand (\$850,000.00) Dollars, to be paid by check drawn on a New York bank on or before July 31, 1998.

IT IS FURTHER AGREED, that all appeals and proceedings will be withdrawn as part of the settlement.

The stipulation is dated July 7, 1998.

12. During 1991 petitioner filed a Claim for Refund of Real Property Transfer Gains Tax in the amount of \$533,273.51. The refund claim is based upon gains tax paid as part of the Taft Hotel project. Following an audit by the Division, the amount of the refund was reduced to \$529,873.00.

13. On July 31, 1995, the Division issued to petitioner a Notice of Determination under Gains Tax Law, number GT-95073101, which indicated that petitioner was liable as a transferee for its purchase of the 35% partnership interest from Sholom Drizin. The notice provided that petitioner was being assessed tax due of \$623,541.00, plus penalty and interest, and also indicated that overpayment relating to the condominium development in the amount of \$529,873.00 had been applied to the amount due.

***ADDITIONAL FINDINGS OF FACT***

14. Petitioner filed the Real Property Transfer Gains Tax Questionnaire in which it sought to claim the cost of the acquisition of the 35% partnership interest transferred by Sholom Drizin as part of its original purchase price as the transferor, “Taft Partners Development Group.” The Schedule of Original Purchase Price for Cooperatives and Condominiums and the Supplemental Worksheet for Schedule of Original Purchase Price for Cooperatives and Condominiums filed by petitioner with the Transferor Questionnaire on September 8, 1998 also indicated the transferor to be “Taft Partners Development Group.”

15. Following the remand of this matter by the Tax Appeals Tribunal, the Administrative Law Judge provided the parties with four options as to the procedure that was to be used to address the issue presented. The options included a scheduled hearing, the presentation of additional evidence and briefs through submission, the filing of additional briefs or a determination based on the record as it then stood. The Division opted to introduce additional evidence and briefs through the submission process. The taxpayer’s representative advised the Administrative Law Judge that “[t]he petitioner does not believe that there is any reason to reopen the case for the presentation of additional evidence or to file briefs. Nevertheless, the



petitioner is willing to submit an additional brief if you believe that such a brief would assist you in resolving the issue.”

### ***CONCLUSIONS OF LAW***

A. There are several factors which dictate that petitioner be considered the transferee in the transaction at issue. Initially it is noted that a partnership, unlike a corporation, is not, generally, a legal entity separate and apart from the individuals comprising it (15 NY Jur 2d, Business Relationships, § 1285). Thus, the notice of determination issued to Taft Partners was, in effect, a notice issued to the five partners. Four partners were the transferees in the transaction at issue, and the fifth partner, Sholom Drizin, was the transferor and was also liable and assessed for the unpaid real property gains tax.

In addition, the transferor questionnaire and other forms filed at the time that the Taft Hotel was being developed and converted to condominium status and which claimed the acquisition of the 35% partnership interest as part of its original purchase price stated that the transferor was petitioner, indicating the transferee in the transaction at issue to be petitioner as well. In addition, the transferee questionnaire filed claiming the 35% interest transfer indicated petitioner to be the transferee. It would be unreasonable to conclude that petitioner was not the transferee in the transfer at issue when it had represented to the Division in several filings that it was, in fact, the transferee.

B. It is also noted that a review of the notice of determination itself leaves no doubt that, notwithstanding that the transferee is stated to be Taft Partners Development Group rather than listing the four individual partners, the partners were aware of the real property transfers upon which the Division sought to assess gains tax pursuant to the statutory notice dated July 31, 1995. Stated differently, it is clear that the notice alerted the partners to the assessment and

contained sufficient information to apprise the partners of the basis of the assessment and the specific transaction giving rise to the assessment. Both the courts and the Tax Appeals Tribunal have repeatedly held that, absent evidence of harm or prejudice to petitioner, defects on the face of a notice will not invalidate the notice (*Matter of Agosto v. State Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892; *Matter of A & J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992; *Matter of Tops, Inc.*, Tax Appeals Tribunal, November 22, 1989). In the present matter, petitioner has neither asserted nor proven any harm or prejudice occurring as a result of the alleged error on the notice of determination. In fact, petitioner was satisfied that both the record in this matter and the legal arguments made were sufficient prior to this case being remanded to the Administrative Law Judge. Accordingly, petitioner's contention with respect to this alleged error must be dismissed.

C. The petition of Taft Partners Development Group is denied, and the denial of petitioner's refund claim by the Division of Taxation is sustained.

DATED: Troy, New York  
July 24, 2003

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE